80-159

No.

Supreme Court, U. S.
FILED
AUG2 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

DAVID R. GREEN,

Petitioner,

versus

AMERADA HESS CORPORATION,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

## PETITION FOR CERTIORARI

Dixon L. Pyles
Pyles & Tucker
507 E. Pearl Street
Jackson, Mississippi 39201
Tel. (601) 354-5668

James M. Brown
Butler & Brown
P. O. Box 393
Laurel, Mississippi 39940
Tel. (601) 428-0940

Attorneys for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

## QUESTIONS PRESENTED

Whether an employee discharged for filing a legitimate claim for medical and other benefits under Mississippi's workmen's compensation statutes has a protected property interest in his continued employment?

Whether the petitioner was deprived of his property interest in violation of the due process clause of the Fifth Amendment to the Constitution of the United States by the dismissal of his diversity action pursuant to Rule 56 under the "terminable at will" doctrine because there was an absence of explicit statutory provision for a civil remedy in the Mississippi Workmen's Compensation Act to redress a retaliatory discharge?

Whether the employer's written memoranda entitled "Benefit Program For Employees" plus the agreement by the petitioner to invest four percent per month of his compensation in the employer's business and other circumstances for job security were sufficient to show an intent to enter into a contract of permanent employment not terminable at the will of the employer?

Whether this Court should now formulate clear guidelines to shield two thirds of the American work force from wrongful discharge by the pro forma application of the outmoded common law rule that presumes that nonunion employees can be terminated at the will of the employer?

# TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

1. The Decision Of The Court Of Appeals For The Fifth Circuit In This Case Conflicts With A Long Line Of Decisions Of The United States Supreme Court Concerning Green's Protectable Property Interest In His Continued Employment Which Was Created By The Written Fixed Term Contract And Mississippi Law ..... 7

2. The Decision Of The Court Of Appeals For The Fifth Circuit Court Raises And Highlights The Significant And Recurring Problems For 65 Percent Of The American Work Force Who Are Unprotected From Wrongful Discharge Because Of The *Pro Forma* Application By The Courts Of The Harsh And Outmoded Common Law

PREVIOUS PAGE WAS BLANK

TABLE OF CONTENTS (Continued)

Page

Rule That Presumes The Employment Of Nonunion Workers To Be Terminable At The Will Of The Employer And This Court Should Now Formulate Clear Guidelines In Such Cases ..... 14

CONCLUSION ..... 20

CERTIFICATE OF SERVICE ..... 21

APPENDIX A — Opinion, U.S. Court of Appeals, 5th Circuit, *David R. Green v. Amerada Hess Corp.*, 612 F.2d 212 (1980) ..... 1a

APPENDIX B — Findings of Fact and Conclusions of Law - Judgment, U.S. District Court, S.D. MS ..... 5a

APPENDIX C — Denial of Petition for Rehearing and Rehearing En Banc, U.S. Court of Appeals, 5th Circuit ..... 11a

APPENDIX D — Excerpts from Benefit Program for Employees ..... 12a

APPENDIX E — Supreme Court Order granting extension of time for filing Petition .... 19a

# TABLE OF AUTHORITIES

*Cases* Page

*Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) ..... 17

*Alvers v. Wilson & Co.*, 185 F.Supp. 812 (D.C. Minn. 1969) ..... 12

*Arnett v. Kennedy*, 416 U.S. 134 (1974) ..... 8

*Bishop v. Wood*, 426 U.S. 341 (1976) ..... 8

*Board of Regents v. Roth*, 408 U.S. 564 (1972) ....8,12

*Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (en banc) ..... 18

*Carnig v. Carr*, 167 Mass. 544, 46 N.E. 117, 35 LRA 512 (1897) ..... 10

*Clinton Service Co. v. Thornton*, 100 So.2d 863, 866, 867 (Miss. 1958) .....11

*Dufour v. Continental Southern Lines*, 68 So.2d 489, 492 (Miss. 1935) ..... 13

*Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974) ..... 17

*Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) ..... 16

*Fuentes v. Shevin*, 407 U.S. 67 (1972) ..... 8

*Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal.App. 793, 13 Cal. Rptr. 796 (1961) ..... 18

TABLE OF AUTHORITIES (Continued)

Page

*Greene v. Howard University*, 412 F.2d 1128, 1133-34 n.4 (D.C.D.C. 1969) ..... 13

*Harless v. First National Bank*, 346 N.E.2d 270, 275 (W. Va. 1978) ..... 18

*Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978) ..... 18

*Littell v. Evening Star Newspaper Co.*, 120 F.2d 36, 37 (D.C. Cir. 1941) ..... 11

*McNalty v. Borden, Inc.*, 474 F.Supp. 20 (E.D. Pa. 1979) ..... 18

*Memphis Light, Gas & Water Div. v. Craft*, 416 U.S. 134 (1977) ..... 8

*Monge v. Beebe*, 114 N.H. 130, 316 A.2d 549 (1974) ..... 16,17

*Montalvo v. Zamora*, 7 Cal.App.3d 69, 86 Cal. Rptr. 401 (1970) ..... 18

*Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) ..... 18

*Perry v. Sinderman*, 408 U.S. 593 (1972) ..... 8,9,13

*Petermann v. Teamsters Local 396*, 174 Cal.App.2d 184, 189, 344 P.2d 25, 28 (1959) ..... 17

*Pierce v. Tennessee Coal, Iron & R. R. Co.*, 173 U.S. 1 (1899) ..... 10,12

*Pstragowski v. Metropolitan Ins. Co.*, 553 F.2d 1 (1st Cir. 1977) ..... 17

TABLE OF AUTHORITIES (Continued)

Page

*Rape v. Mobile & Ohio R. R. Co.*, 136 Miss. 38, 100 So. 585 (1924) ..... 9,10

*Sartin v. City of Columbus Utility Commission*, CA 5, 573 F.2d 84, affirming D.C. Miss., 421 F.Supp. 393 ..... 11

*Southern Bus Lines v. Amalgamated Association of Street, Electric Railway & Motor Coach Employees*, 205 Miss. 354, 38 So.2d 765 (1949) ..... 8

*Stephenson v. New Orleans & N.E.R. Co.*, 180 Miss. 147, 177 So. 509 (1937) ..... 8

*Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) ..... 18

*United Steelworkers v. Warrior & Gulf*, 363 U.S. 574, 579 (1960) ..... 12,13

*Zimmer v. Wells Management Corp.*, 348 F.Supp. 540 (S.D.N.Y. 1972) ..... 17

*Statutes*

Mississippi Code Annotated (1972) ..... 4

Mississippi Workmen's Compensation Act (MWCA) ..... *passim*

*Other Authorities*

42 Harvard Law Review '76, Winfield, *Public Policy and English Common Law* (1928) ..... 15

TABLE OF AUTHORITIES (Continued)

Page

93 Harvard Law Review No. 8, June 1980, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, pp. 1816-1844, FU 2 ..... 14

1977 Wis. L.Rev. 777, 797-798, *Protecting The Private Sector At Will Employee Who "Blows the Whistle"; A Cause of Action Based Upon Determinants Of Public Policy* ..... 18

United States Constitution, Amendment V ....2,8

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DAVID R. GREEN,

Petitioner,

versus

AMERADA HESS CORPORATION,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

# PETITION FOR CERTIORARI

The petitioner, David R. Green, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on February 21, 1980.

## OPINION BELOW

The opinion of the Court of Appeals appears at 612 F.2d 212 (1980); and it summarily affirmed the judgment of the District Court for the Southern District of Mississippi. Both opinions appear in the appendix hereto as Appendices A and B, respectively.

## JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on February 21, 1980. (App. A) A timely petition for rehearing *en banc* was denied March 18, 1980. (App. C) On June 19, 1980, Mr. Justice Powell signed an order extending the time for filing the petition for Writ of Certiorari to and including July 21, 1980, and on July 17, 1980, further extended the time for filing to August 4, 1980. (App. E) This Court's jurisdiction was invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

The petitioner entered into a contract of employment with Amerada Hess effective January 1, 1972. The parties agreed to continue the employment until Green's normal retirement date on the first day of the month following the month in which he attained age 65. Green was born December 23, 1939. His normal retirement date was January 1, 2005. The fixed term of his employment was 34 years under the contract. At the time of the employment agreement, Green was provided a written "memorandum" entitled "Benefit Program For Employees." The memoranda included "Employees' Pension Plan"; (2) "Savings and Stock Bonus Plan"; (3) "Medical Expense Benefits"; (4) "Income Protection"; (5) Survivor Benefits"; and (6) "Personnel Policies." Green was also supplied separate "memoranda" of each of the employee benefit programs which spelled out in more detail the advantages to Green of accepting employment with Amerada Hess and remaining with the employer until January 1, 2005. The "memoranda" clearly is evidence of a written contract of employment between Green and Amerada Hess, and it supports the claim of the petitioner's entitlement to continued employment, and his civil action for wrongful discharge. The courts below totally ignored the provisions of the "memoranda." The explicit contractual provisions of the "memoranda" are supplemental and supported by the agreements implied from the words, conduct and circumstances of Amerada Hess representatives relating to usage of the past. The unwritten "common law" of the respondent

also supplements the "memoranda." The summary manner in which the civil action case was dismissed prevented a full development of these facts. For job security, Green not only promised to provide his services for wages, but he agreed to and did give Amerada Hess additional consideration for the employment contract by investing in the employer's business at the rate of four percent per month of the compensation paid him by the corporation. These facts are sufficient as a matter of Mississippi law to demonstrate that Amerada Hess and Green intended to enter into a contract of employment for a fixed term to continue until the petitioner reached his normal retirement date on January 1, 2005. As a matter of Mississippi law the agreement was therefore not terminable at the will of Amerada Hess as the courts below mistakenly held.

On April 15, 1973, Green sustained severe accidental injuries to his cervical and lumbar spine on a pipe structure while performing services for Amerada Hess. The injuries were duly reported to the employer on April 16, 1973. Green was provided medical treatment by Amerada Hess as required by the Mississippi Workmen's Compensation Act [(MWCA), Mississippi 1972 Code Annotated (MCA) §§71-3-1 et seq., MWCA §7, *Medical Service and Supplies* MCA §71-3-1-15)]. While undergoing conservative medical treatment, Green continued to work. His condition progressively worsened, and on April 9, 1974, Green was admitted to the hospital where neurological and myelographic examinations were carried out. The petitioner was dis-

charged from the hospital on April 16, 1974, with a diagnosis of cervical spondylosis at C6-7 with bilateral nerve root compression. Green resumed working. On October 13, 1974, Green was again admitted to the hospital and an anterior vertebral fusion was done at the C6-7 interspace and a large bar which had impinged on the nerve root bilaterally was removed. Green was discharged from the hospital on October 21, 1974.

The Travelers Insurance Company, the workmen's compensation carrier for Amerada Hess, paid compensation for temporary total disability benefits from October 13, 1974, through December 12, 1974, and Green again attempted to return to work. The pain and back problems persisted. Green continued to work, but it was apparent that he would need additional prolonged medical treatment with probable surgery in the lumbosacral area.

Green became embroiled in a controversy concerning the medical treatment required, and he let it be known that he intended to file a claim for medical and other benefits with the Mississippi Workmen's Compensation Commission (MWCC) before the period of limitations expired. On July 24, 1975, Green was summarily discharged. The next day, July 25, 1975, the petitioner filed an application for benefits with the MWCC including a request for additional medical treatment. Green remained unemployed until October 1, 1975, at which time he received employment with the State Game and Fish Commission at a reduced income. On

September 29, 1978, Green was awarded medical and other benefits by the MWCC.

On June 12, 1978, Green initiated a diversity action in the federal district court against Amerada Hess, charging that he was wrongfully discharged from his employment because he insisted on securing his rights and benefits under the Mississippi Workmen's Compensation Act. The suit also charged that Amerada Hess sought to make an example of Green in order to demonstrate to other employees the futility of seeking benefits under the MWCA by instilling a pervasive fear in the minds of the other employees of losing their jobs for exercising their legal rights. On a motion for summary judgment the district court wrongfully concluded that Amerada Hess had a legal right, without the fear of the imposition of any sanctions whatsoever, to make an example of Green by discharging him in bad faith, in order "to constrain" its "other employees not to pursue workmen's compensation benefits for fear of reprisal." The district court mistakenly ruled in an arbitrary and capricious manner that Green was employed for an indefinite period of time and his employment was terminable at the will of Amerada Hess even for a bad faith reason. The district court also ruled that MWCA "provided no civil cause of action" to Green even though he was wrongfully discharged in bad faith by his employer for legally pursuing his rights under the Mississippi statute. The district court said Green was wholly without legal rem-

edy to redress his bad faith discharge, even though he was properly exercising a right accorded him by the Mississippi legislature in the reasonable exercise of the police power of the state; and even though the action was in derogation of the humane and beneficent announced public policy of relieving society of the burden of supporting employees and their dependents because of economic loss due to injury or death in industrial accidents. The district court also mistakenly ruled that there was no genuine issue of material facts, and Amerada Hess was entitled to a judgment as a matter of law. The Circuit Court of Appeals for the Fifth Circuit summarily affirmed the decision of the district court holding that Green did not state a cause of action "under Mississippi law" in the absence of controlling Mississippi precedent expressed in the MWCA. The court below said it was not the province of the federal appellate court to fashion for Mississippi ". . . a wise and progressive social policy."

## REASONS FOR GRANTING THE WRIT

1. **The Decision Of The Court Of Appeals For The Fifth Circuit In This Case Conflicts With A Long Line Of Decisions Of The United States Supreme Court Concerning Green's Protectable Property Interest In His Continued Employment Which Was Created By The Written Fixed Term Contract And Mississippi Law.**

The petitioner has a protectable property interest in his continued employment with Amerada Hess which was created by the written fixed term contract (memoranda) and by Mississippi law. *Bishop v. Wood*, 1976, 426 U.S. 341; *Board of Regents v. Roth*, 1972, 408 U.S. 564; *Perry v. Sinderman*, 1972, 408 U.S. 593. Because Green thus does enjoy a protectable property interest in his continued employment, this record reveals that he was summarily deprived of that interest in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. *Southern Bus Lines. v. Amalgamated Association of Street, Electric Railway & Motor Coach Employees*, (1949) 205 Miss. 354, 38 So.2d 765; *Stephenson v. New Orleans & N.E.R. Co.* (1937) 180 Miss. 147, 177 So. 509. Green's protectable property claim need not be unconditional, *Fuentes v. Shevin*, 1972, 407 U.S. 67; and the petitioner's property interest claim to his continued employment with Amerada Hess is not precluded, as the courts below ruled, by the absence of a specific statutory procedure under the Mississippi Workmen's Compensation Act for its protection in the federal court. *Memphis Light, Gas & Water Div. v. Craft*, 1977, 416 U.S. 134; *Arnett v. Kennedy*, 1974, 416 U.S. 134. A property interest in continued employment can, of course, be created by a statute or an implied contract. 426 U.S. at page 344. In either instance the sufficiency of Green's claim to entitlement of continued employment with Amerada Hess as set forth in the civil complaint in the district court must be by reference to and examination of the entire panoply of Mississippi law, not to a single specific statute. In *Perry v. Sinderman*, 408

U.S. at page 601, the Supreme Court said that a person's interest in a benefit is a property interest for due process purposes if there are ". . . rules or mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke at a hearing." It is not contended in this petition that Green's property interests in his continued employment with Amerada Hess were created by the Constitution of the United States. Green does contend, however, that his property interests in his continued employment with Amerada Hess were created by the written "memoranda," the agreements and understanding of the contract of employment, and the Mississippi contract law which secured to him the right to redress in the federal district court the breach of the explicit fixed term agreement, and the tortious breach of duty on the part of his employer. 408 U.S. at page 577. The district court and the Circuit Court of Appeals for the Fifth Circuit totally ignored the contractual basis for Green's claim in the unseemly haste to eject him from the courthouse.

The Court of Appeals for the Fifth Circuit mistakenly held in this case that: "an employer under Mississippi law has a legal right to discharge employees employed for an indefinite term without any justification . . . *Rape v. Mobile & Ohio R. R. Co.*, 136 Miss. 38, 100 So. 585 (1924) . . . It is clear that the terminable at will rule which Mississippi follows is directly relevant to the resolution of the issue on appeal . . . While the harshness of the terminable at will rule is subject to ex-

ceptions in light of express legislative action, the absence of explicit statutory provision of a civil remedy in Mississippi's compensation statute argues against recognizing a cause of action for retaliatory discharge. . ." 612 F.2d at page 214. The statements of the courts below as to the holdings of the Mississippi Supreme Court are neither a tenable nor accurate pronouncement of Mississippi law. In *Rape,* the case relied on by the courts below, the Mississippi Supreme Court ruled that a contract of employment *is not terminable at will if it is supported by an independent consideration, other than the obligation of service to be performed on one hand and wages to be paid on the other.* If the employee purchases employment with a valuable consideration outside the services which he renders from day to day the established rule is that permanent employment will endure as long as the employer shall be engaged in business and have work for the employee to do and the latter shall perform the service satisfactorily. 100 So. at pages 587, 588.

As pointed out heretofore, Green agreed to and gave, for job security, in addition to the services which he promised to perform, extra and other considerations in the nature of compensation at the rate of four percent per month as an investment in the business of Amerada Hess. Annotation: Contract for Permanent Employment, 135 ALR 645, 646, 648-690; *Pierce v. Tennessee Coal, Iron & R. R. Co.,* 1899, 173 U.S. 1; *Carnig v. Carr* (1897) 167 Mass. 544, 46 N.E. 117, 35 LRA 512 and Note. - Contracts for permanent employment, and similar agreements; *Sartin v. City of Columbus Utility Commission,*

5CA, 573 F.2d 84, affirming District Court of Mississippi, 421 F.Supp. 393; *Clinton Service Company v. Thornton* (Miss. 1958) 100 So.2d 863, 866, 867. In *Littell v. Evening Star Newspaper Co.* (CA DC 1941), 120 F.2d 36, 37, the court said:

> "[1-3] . . . Where the intent is not clearly revealed by the express terms of the agreement, the courts will look to evidence of surrounding circumstances to determine what was in the minds of the contracting parties. Thus, when one who enters into a contract of employment, promises not only that he will give his services but also additional consideration — as, for example, by making an investment in the business, by resigning from government service, by giving up his own business, or by relinquishing an acknowledged right to recover for injury which he has suffered — such facts may be sufficient, in each case, to show the intent of the parties to enter into a contract for permanent employment." (Cases in footnotes omitted.)

The courts below erred in failing to consider the evidence of the surrounding circumstances in this civil action to ascertain what was in the minds of the parties. The summary dismissal of petitioner's complaint was improper.

Since 1935 the courts have adopted a concept which states that employment contracts may be supplement-

ed by the "common law" of a particular plant or of the industry. *United Steelworkers v. Warrior & Gulf* (1960) 363 U.S. 574, 579. In the 19th-century contract law, employees exchanged their labor and services for the wages they earned. As pointed out herein before, for job security, employees often agreed to additional consideration such as foregoing other job offers, seeking other employment, or subjecting themselves to possible violence, etc. *Alvers v. Wilson & Co.* (DC Minn. 1969) 185 F.Supp. 812.

In the modern context, separate considerations are viewed as a condition to enforcement of employment agreements evidenced by memoranda promising retirement as well as other employee benefits which indicate the intention of the parties. 120 F.2d at page 37. The legal theory is that employees do not confer such benefits except under conditions of an express or implied promise of job security. It is too unlikely to be believed that Green and Amerada Hess entered the employment relationship to continue at the sole pleasure of Amerada Hess. *Pierce v. Tennessee Coal, Iron and R. R. Co.* (1899) 173 U.S. 1.

The "common-law of the job" established by Amerada Hess determines the intent of the employment agreement as evidenced by the "memoranda" thereasto with Green, which was set forth as the policy of the company in the "Benefits Program For Employees." It indicates the reasonable expectations of Green and Amerada Hess. The "common law" of the "job" in this case together with the "memoranda" establishes that

Green, had job security, and the memoranda also helps to define the employment agreement. *Board of Regents v. Roth* (1972), 408 U.S. 564; *Perry v. Sinderman* (1972) 408 U.S. 593; *Steelworkers*, supra.

The express and implied personnel policy of Amerada Hess establish the terms and conditions of the employment agreement with Green. The policy of Amerada Hess is expressed in the "memoranda." *Greene v. Howard University* (DC DC 1969) 412 F.2d 1128, 1133-34 & fn. 4.

Under Mississippi law, the termination of petitioner for violation of the Amerada Hess rule against filing a workmen's compensation claim, to be enforceable, must be legal, known to Green, judged to be "reasonable" under the circumstances of this case. *Dufour v. Continental Southern Lines* (1935) 68 So.2d 489, 492. Under the circumstances of this case and the Mississippi decisions, Green would not be discharged without sufficient cause. The evidence in this case conclusively shows that the cause alleged in the complaint, for termination, and which must be accepted as true, was *not* lawful, just or sufficient. In any event the justification for the discharge would be a factual question to be determined by the triers of fact, and could not be adjudicated on a Rule 56 or Rule 12(b)(6) motion.

Green justifiably considered that as a part of his employment contract he could earn a larger salary plus the higher retirement benefits by performing his duties in a reasonably satisfactory manner until age 65,

at which time he could receive the payment of the retirement wages which is a form of a deferred salary, plus the accrual of rights to other additional employee benefits. The Amerada Hess pension plan is, by operation of law, adjusted compensation for past services rendered. It is deferred compensation.

The conflicts discussed in section 1 of this petition justify the grant of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit.

**2. The Decision Of The Court Of Appeals For The Fifth Circuit Court Raises And Highlights The Significant And Recurring Problems For 65 Percent Of The American Work Force Who Are Unprotected From Wrongful Discharge Because Of The *Pro Forma* Application By The Courts Of The Harsh And Outmoded Common Law Rule That Presumes The Employment Of Nonunion Workers To Be Terminable At The Will Of The Employer And This Court Should Now Formulate Clear Guidelines In Such Cases.**

The opinion of the Court of Appeals for the Fifth Circuit in Green's civil action reflects and focuses on the unprotected and helpless status of approximately two-thirds[1] of the American work force who are *not*

---

1 93 Harvard Law Review No. 8, June 1980, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith.* pp. 1816-1844, FU 2.

covered by union collective bargaining agreements or by statutes or regulations which customarily shield public employees. The machine like and unwarranted application by the courts below of the outmoded common law rule, presumes that the employment of these workers is terminable at the will of the employer who was accorded absolute authority to discharge Green without notice or justifiable cause, for abusive and bad motives. Green and the workers who are also in the "untouchable" class with him, are denied an effective judicial forum to redress wrongs imposed on them. This court has not heretofore addressed itself to these matters. There are compelling reasons why some clear guidelines in the application of the "terminable at will" common law rule should now be marked by this court. Green and the millions of unprotected workers in the United States urgently need the assistance of the Supreme Court in providing an effective forum to redress the wrongs to which he and they are subjected. He entreats this court to take the initial step to fashion a body of laws to afford the nonunion employee protection somewhat along the lines afforded the union worker and the public employee.

Traditionally in American jurisprudence the law of torts has been the battle ground of social theory. The notion of "public policy" involved in private cases is not new or novel.[2] The administration of the law has long been a process of weighing the interests for which one party demands protection against another's claim to

---

2 Winfield, Public Policy and English Common Law, 1928, 42 Harvard Law Review 76.

unrestrained freedom in the furtherance of the latter's objectives. When the interest of the public is laid on the scale and tips the balance the result is the use of the law as the instrument to promote the greatest good for the greatest number, which by common consent is the object of society. This law of torts has received general recognition in this field, although the process is not an easy or simple task. In marking guidelines the object is to make the rule sufficiently flexible to allow for particular circumstances but rigid enough to afford a reasonable prediction of the ultimate decision and which will permit a dependable route to follow. Green makes no claim of comprehensiveness in the suggested considerations which follow.

One of the factors which it is suggested this court may consider is the moral aspect of the conduct of Amerada Hess in its dealings with Green. In a general way, the law of torts reflects that the public's current ideas of morality and the law has usually kept pace with those ideas. The ethical principles which underlie the law are based upon considerations of public policy.

This Court should hold that every employment contract imposes an obligation of "good faith" in its performance or enforcement. The employer's freedom to discharge an employee should be limited by implying a duty to terminate the worker's services only on the basis of good faith. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe*, 114 N.H. 130, 316 A.2d 549 (1974), In *Fortune*, the

Massachusetts Supreme Judicial Court held that the employee's employment contract, like every other contract, contained an implied covenant of good faith. 373 Mass. at page 104. The implied covenant of good faith would limit the power and authority of the employer to discharge the worker. The New Hampshire Supreme Court, in *Monge*, imposed a good faith limitation on the employer, because it said that an absolute right to discharge endangered the state's important public policy of improving labor relations. The imposition of a "good faith" covenant in employment contracts would afford employees equitable and legal remedies to redress "bad faith" discharges. *Pstragowski v. Metropolitan Ins. Co.*, 553 F.2d 1 (1st Cir. 1977); *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974); *Zimmer v. Wells Management Corp.*, 348 F.Supp. 540 (S.D.N.Y. 1972); *Petermann v. Teamsters Local 396*, 174 Cal. App.2d 184, 189, 344 P.2d 25, 28 (1959).

This Court should also hold that cases of "abusive discharge" give rise to a cause of action because of the infliction of emotional harm where the conduct of the employer is outrageous and extreme. *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976).

Green entreats this Court to hold as a part of the guidelines that the conduct of an employer which tends to erode "public policy" should afford the employee a cause of action. In Green's case specifically this Court should hold that the petitioner stated a cause of action in tort based on the conduct of Amerada Hess in discharging him because the conduct undermined an im-

portant public policy of Mississippi concerning the workmen's compensation statutes. In *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978) the court held the employer liable in tort for the retaliatory discharge of an employee who had filed a legitimate claim under the workmen's compensation law but the courts below refused to accept the tort theory in Green's case. The tort theory was also applied by the Oregon court to an employee who was fired for taking time to serve on a jury. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). Also giving rise to a successful tort claim was the case of a bank employee who notified superiors of the bank's violation of the consumer credit laws. *Harless v. First National Bank*, 346 N.E.2d 270, 275 (W. Va. 1978). The "public policy" rationale have been used by a number of courts to develop a shield for employees discharged in contravention of some independent statutory policy. *McNalty v. Borden, Inc.*, 474 F.Supp. 20 (E.D. Pa. 1979); *Montalvo v. Zamora*, 7 Cal.App. 3rd 69, 86 Cal.Rptr. 401 (1970); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 793, 13 Cal. Rptr. 796 (1961); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (en banc). Comment, 1977 Wis. L. Rev. 777, 797-798, *Protecting the Private Sector At Will Employee Who "Blows the Whistle"; A Cause of Action Based Upon Determinants of Public Policy.*

The courts themselves created the common law principle which presumes the employment of nonunion workers to be terminable at will or whim of their respective employers. It is therefore fittingly appro-

priate that this Court take the lead in modifying the common law rule by providing guidelines along the lines discussed above. This Court possesses the legitimate heritage of common law innovation that develops new principles to accommodate changing values and needs, and it is therefore the most appropriate forum for the creation of job security rights. This Court has had extensive experience in the area of employer-employee relations. This Court possesses sufficient expertise to amply deal with all aspects pertaining to wrongful discharge controversies. It is not necessary for this Court to await legislative initiative to effect changes in the court created doctrinal "employment at will" precept.

In setting forth the guidelines necessary to correct the serious inequities and harm brought about by the employer abuse of the discretion to terminate the employment of unprotected workers, this Court should imply a contract term allowing only good faith discharges, and create a tort duty that employers discharge only in good faith. Such a decision will more nearly place the overwhelming majority of American workers who have no protection at present on a parity with those employees protected by union collective bargaining agreements and those employees in the public sector.

## CONCLUSION

For the reasons presented hereinbefore, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit in Green's case.

Respectfully submitted,

_____

Of Counsel for Petitioner

Dixon L. Pyles
Pyles & Tucker
507 E. Pearl Street
Jackson, Mississippi 39201
Tel. (601) 354-5668

and

James M. Brown
Butler & Brown
P.O. Box 393
Laurel, Mississippi 39940
Tel. (601) 428-0904

Attorneys for Petitioner

August ____, 1980.

## CERTIFICATE OF SERVICE

The undersigned certifies that on the date set forth hereinafter, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Brunini, Grantham, Grower & Hewes
P.O. Drawer 119
Jackson, Mississippi 39205

Attorneys for Amerada Hess Corporation-Respondent

I further certify that all parties required to be served have been served.

Dated August ____, 1980.

_____

Dixon L. Pyles

# APPENDIX A

David R. GREEN, Plaintiff-Appellant,

v.

AMERADA-HESS CORPORATION,
Defendant-Appellee.

No. 79-2927
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1980.

Rehearing and Rehearing En Banc
Denied March 18, 1980.

---

Appeal from the United States District Court for the Southern District of Mississippi.

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

AINSWORTH, Circuit Judge:

Appellant David R. Green brought a Mississippi diversity suit against appellee Amerada Hess Corpora-

---

* Fed.R.App.P. 34(a); 5th Cir.R. 18.

tion claiming that he was wrongfully discharged from his job for pursuing his rights under Mississippi's workmen's compensation statute. The district court granted Amerada Hess' motion for summary judgment on the ground that the appellant's claim did not state a valid cause of action under Mississippi law. On appeal, appellant Green argues that such a wrongful discharge raises a cognizable claim. Disagreeing with appellant's contention, we affirm the decision of the district court.

The facts relevant to this appeal are as follows. Appellant was first employed by Amerada Hess on January 1, 1972. He did not have a written contract of employment, but was hired for an indefinite period of time. On April 15, 1973, while in the employ of Amerada Hess, appellant Green sustained an injury as the result of an employment-related accident. Green filed an accident report the next day, but continued working until April 9, 1974 at which time he entered the hospital for diagnostic tests. After a one-week hiatus, appellant returned to work until October 1974 when he was hospitalized for back surgery. After recuperating, he resumed his employment in December 1974. On July 24, 1975, Green was dismissed allegedly in retaliation for seeking to pursue his rights to workmen's compensation.[1]

---

1 Amerada Hess argues that apart from the issue whether appellant stated a cause of action under state law, the uncontroverted facts show that Green was not discharged for pursuing his workmen's compensation rights. Since the district court did not explicitly state that retaliation was not involved, but rather relied on the view that the allegations did not state a proper cause of action, we decline to address Amerada Hess' argument.

Unlike other state statutes which explicitly provide for a civil action for a retaliatory discharge, *see* Tex. Rev.Civ.Stat. Ann. art. 8307c (Vernon Cum.Supp. 1978), the Mississippi statute does not so provide. Mississippi Workmen's Compensation law, Miss. Code Ann. §71-3-1 *et seq.* (1972). Moreover, Mississippi courts have not specifically decided the question whether an employer may be liable in damages for discharging an employee for pursuing his workmen's compensation rights. In the absence of controlling precedent, we must nonetheless decide this issue as we believe a Mississippi court would decide it. *Loucks v. Star City Glass Co.*, 551 F.2d 745, 746 (7th Cir. 1977). In this regard, special weight must be given to the determination of the district court judge who is familiar with local law. *See Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 204, 76 S.Ct. 273, 277, 100 L.Ed. 199 (1956). As found by the district court, an employer under Mississippi law has the legal right to discharge employees employed for an indefinite term without any justification. *Montgomery Ward & Co., Inc. v. Skinner*, 200 Miss. 44, 25 So.2d 572, 576 (1946); *Rape v. Mobile & Ohio R. R. Co.*, 136 Miss. 38, 100 So. 585 (1924). It is clear that the terminable at will rule which Mississippi follows is directly relevant to the resolution of the issue on appeal. *Loucks, supra*, 551 F.2d at 747. While the harshness of the terminable at will rule is subject to exception in light of express legislative action, the absence of explicit statutory provision of a civil remedy in the Mississippi workmen's compensation statute argues against

recognizing a cause of action for retaliatory discharge. *Loucks, supra,* 551 F.2d at 747-49.[2]

Appellant argues that even though Mississippi courts have not yet recognized a cause of action for retaliatory discharge, it is likely that they will do so when faced with an appropriate case in light of recent precedents from other jurisdictions finding such a cause of action. We decline this invitation to create law for Mississippi given the conflicting nature of existing precedents. *Compare Martin v. Tapley,* 360 So.2d 708 (Ala. 1978) (refusing to recognize cause of action for retaliatory discharge); *Dockery v. Lampart Table Co.,* 36 N.C.App. 293, 244 S.E.2d 272, *cert. denied,* 295 N.C. 465, 246 S.E.2d 215 (1978) (same); *Segal v. Arrow Industries Corp.,* 364 So.2d 89 (Fla. App. 1978) (same) with *Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353 (1979) recognizing a cause of action for retaliatory discharge); *Brown v. Transcon Lines,* 284 Or. 597, 588 P.2d 1087 (1978) (same); *Frampton v. Central Indiana Gas Co.,* 260 Ind. 249, 297 N.E.2d 425 (1973) (same); *Sventko v.*

---

2 Appellant seeks to distinguish *Loucks* on the ground that a subsequent decision by the Illinois Supreme Court in effect "overruled" *Loucks* by finding that allegations of retaliatory discharge stated a proper cause of action under Illinois Law. Appellant's characterization of *Loucks* as "overruled," however, is inaccurate. The central issue in *Loucks,* as in this case, is the appropriate role of the federal courts in applying state law in diversity actions. The fact that the law in Illinois has now been clarified is irrelevant to our concern with maintaining a proper relationship vis-a-vis state courts.

*Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).[3] As stated in *Loucks*, "it is not our province as a federal appellate court to fashion for [a state] what we are certain many would say was a wise and progressive social policy." *Loucks, supra*, 551 F.2d at 746. Thus, in the absence of any civil remedy provided for in the state statute, we affirm the decision of the lower court.

AFFIRMED.

---

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DAVID R. GREEN,
Plaintiff,

versus CA No. E78-0065(C)

AMERADA HESS CORPORATION,
Defendant.

Filed: July 19, 1979

---

3 Indeed, the precedent favoring finding no cause of action for retaliatory discharge seems more likely to be accepted in Mississippi in that those states holding against the employee are in closer geographic proximity to Mississippi. *Cf. Yost v. Morrow*, 262 F.2d 826, 828 n.3 (9th Cir. 1959) (applying law of Oregon to resolve question of Idaho law given geographic proximity).

*FINDINGS OF FACT AND CONCLUSIONS OF LAW*

This case is based upon the allegation that the Plaintiff was wrongfully discharged by Defendant in order to avoid the payment of workmen's compensation benefits to Plaintiff for his work-related injury and to further make an example of the Plaintiff so that Defendant's other employees would be constrained from seeking workmen's compensation benefits for fear of reprisal.

Discovery in this case has been completed. The Defendant has now filed a Motion for Summary Judgment with respect to the entire complaint. The motion is supported with an affidavit, the pleadings, interrogatories, the deposition of Plaintiff, and certified copies of the pleadings, intermediate administrative orders and final full commission order in the proceedings before the Mississippi Workmen's Compensation Commission styled *David R. Green, Claimant, v. Amerada Hess Corporation, Employer, and the Travelers Insurance Company, Carrier,* MWCC No. 74 10431-B-4675. On June 29, 1979, this Court heard oral argument on the Motion by the attorneys for the Defendant, Amerada Hess Corporation, and by the attorneys for the Plaintiff, David R. Green. This Court grants the Defendant, Amerada Hess Corporation, its Motion for Summary Judgment upon the facts and law as hereinafter noted.

## *FINDINGS OF FACT*

I.

The Plaintiff is an adult resident citizen of Clarke County, Mississippi, and the Defendant is a Delaware Corporation, which is qualified to do business in Mississippi and whose registered agent for service of process in Mississippi is C. T. Corporation Systems, located at 118 North Congress Street, Jackson, Mississippi.

II.

The Plaintiff commenced his employment with Defendant on or about January 1, 1972, as a lease operator, which position Plaintiff held during the entire time he was employed by Defendant. Plaintiff did not have a written employment contract which stated a definite period of employment. Instead, he was employed for an indefinite period of time and was paid on an hourly basis.

III.

On April 15, 1973, Plaintiff sustained an accidental work-related injury. He remained in the employment of Defendant until he was discharged on July 24, 1975.

IV.

On July 25, 1975, Plaintiff filed a Motion to Controvert in which he sought to litigate a claim for compensation with regard to his work-related injury of April

15, 1973. The proceeding was styled *David R. Green, Claimant v. Amerada Hess Corporation, Employer, and the Travelers Insurance Company, Carrier,* MWCC No. 74 10431-A-4675. Plaintiff was awarded temporary total disability compensation, temporary partial disability compensation and permanent partial disability compensation by order of the Full Workmen's Compensation Commission on September 29, 1978.

*CONCLUSIONS OF LAW*

I.

The Court has jurisdiction of the parties and subject matter pursuant to 28 U.S.C. 1332.

II.

Under Mississippi law, an employer has the legal right to discharge an employee who is employed for an indefinite period of time for any reason or for no reason at all. Such employment relationship is terminable at the pleasure of either party. Thus, because Plaintiff is not employed for a fixed term, no damages whatever could be awarded to him on account of his discharge by Defendant. *Montgomery Ward & Co., Inc., v. Skinner,* 200 Miss. 44, 25 So.2d 572, 576, 583 (1946); *see Rape v. Mobile & Ohio R. R. Co.,* 136 Miss. 38, 100 So. 585 (1924).

III.

The Mississippi "Workmen's Compensation Law", Miss. Code Ann. §§71-3-1 et seq. (1972), provides no civil cause of action to Plaintiff against the Defendant

on the ground that Plaintiff was discharged because he pursued his rights to workmen's compensation benefits.

IV.

Applying Mississippi law, Plaintiff, who was employed for an indefinite period of time and was thus terminable at will, has no civil cause of action for wrongful discharge on the grounds that he was discharged to avoid payment by Defendant of workmen's compensation benefits and that he was discharged as an example to constrain Defendant's other employees not to pursue workmen's compensation benefits for fear of reprisal. *See Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977).

V.

The pleadings, Defendant's affidavit, the deposition of Plaintiff, the affidavit offered by Plaintiff, and all other materials properly before this Court clearly show that there is no genuine issue of material fact. Furthermore, the authorities presented to the court clearly show that Defendant, the movant, is entitled to a judgment in its favor as a matter of law. Therefore, Defendant's Motion for Summary Judgment is hereby granted and an appropriate Judgment and Order shall be entered. *See Central Oil & Supply Corp. v. The United States*, 557 F.2d 511, 515, rehearing denied 562 F.2d 1257 and *U.S. v. Watson*, 562 F.2d 1258 (en banc) (5th Cir. 1977).

This the 19th day of July, 1979.

/s/ HAROLD COX
HAROLD COX
UNITED STATES DISTRICT
JUDGE

---

JUDGMENT

This cause having come before the Court on Motion of Defendant, Amerada Hess Corporation, for Summary Judgment, along with an Affidavit, the deposition of Plaintiff, pleadings, interrogatories, and certified copies of the pleadings, the intermediate orders, and the final order in the administrative proceeding before the Mississippi Workmen's Compensation Commission, styled *David R. Green, Claimant v. Amerada Hess Corporation, Employer and the Travelers Insurance Company, Carrier,* MWCC No. 74 10431-B-4675; and the Court having heard arguments of counsel, hereby grants the Motion for Summary Judgment in favor of Amerada Hess Corporation for the reasons stated in this Court's Findings of Fact and Conclusions of Law entered this day. Accordingly, it is therefore,

ORDERED, ADJUDGED AND DECREED that Judgment be entered for the Defendant, Amerada Hess Corporation, the complaint herein be dismissed with prejudice, and costs taxed against the Plaintiff.

SO ORDERED, this the 19th day of July, 1979.

/s/ HAROLD COX
HAROLD COX
UNITED STATES DISTRICT
JUDGE

---

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

March 18, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2927 — DAVID R. GREEN v. AMERADA HESS CORPORATION (CA-E78-0065(C))

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ PEGGY KELLER
Deputy Clerk

cc: Mr. James M. Brown
Mr. William C. Butler
Mr. Peter K. Smith
Mr. Guy M. Walker
Mr. Ed Brunini, Jr.
Mr. John E. Milner

---

## APPENDIX D

BENEFIT PROGRAM FOR EMPLOYEES

---

AMERADA HESS CORPORATION

* * *

EMPLOYEES' PENSION PLAN

*Eligibility for Membership*

You will become a member of this Plan automatically on the effective date, if you are a full-time employee

and you are not eligible for membership in another pension plan to which the Company contributes, providing:

1. You are a member of one of the Company's pension plans on the day before the effective date; or
2. You had completed one year of service and were under age 64 when you were last hired.

If you are not eligible for membership on the effective date, you will be eligible to join this Plan after you have completed one year of service, were under age 64 when last hired and are not eligible for membership in another pension plan to which the Company contributes.

*Your Retirement Pension*

Upon retirement, your basic annual pension will be calculated as follows:

1½% of your Final Average Compensation

MULTIPLIED

by your Credited Service

MINUS

1½% of your Primary Social Security Benefit (up to a maximum of 50% of your Primary Social Security Benefit)

14a

MULTIPLIED

by your Credited Service

If on the day before the effective date, you were a member of one of the Company's pension plans, your pension benefit for the period before the effective date will be no less than that calculated under the plans then in effect.

As used in the pension calculation:

1. FINAL AVERAGE COMPENSATION means the average of the five consecutive years of highest earnings during the 10 years immediately preceding your retirement.
2. PRIMARY SOCIAL SECURITY BENEFIT means the amount payable to you at age 65 under the Social Security Act as in effect at the time you retire.
3. CREDITED SERVICE means your period of continuous employment since you were last hired.

If you retire early, your retirement pension will be calculated under the basic formula as of the date you retire. You may elect to defer payment of your pension until age 65 or begin receiving it on the date you retire. In the latter case, it will be actuarially discounted.

If you become eligible for a disability pension, it will be calculated under the basic formula as of the date you retire without actuarial discount.

*When You Retire*

NORMAL

Your Normal Retirement date is the first day of the month after your 65th birthday.

EARLY

You may retire after you reach age 55:

1. At your election if you have completed 25 years of service; or
2. With Company approval, if you have completed 10 years of service.

You may be retired by the Company after you reach age 55 if you have completed 10 years of service.

DISABILITY

You will be retired with a disability pension if:

1. You become totally and permanently disabled; and
2. You are entitled to receive Social Security disability benefits; and
3. You have completed 10 years of service.

*Vesting*

After you have attained age 40 and have completed 10 years of service, if you should leave the Company, you will be entitled to a pension commencing at age 65, calculated under the basic formula as of the date you terminated.

*Forms of Payment*

NORMAL

Normally, your pension will be paid monthly beginning on your retirement date and continue for the rest of your life.

OPTIONAL

Instead of the normal payment, you may elect either of the following options:

1. Joint and Survivor Option — To provide continuing income for your survivor after your death, you may elect to receive a reduced pension for your lifetime with payment continuing to your survivor at the same or a lesser rate.

2. Period Certain Option — If you prefer, you may elect a reduced pension for your lifetime with payments guaranteed for either 60 or 120 months. If you die before the end of the period selected, payment will continue to your beneficiary for the remainder of such period.

*Voluntary Contributions*

If you wish to supplement your basic pension, you may do so by voluntarily contributing from 1% to 10% of your annual compensation. Your contributions will earn interest of 3½% per year. No matching contributions will be made by the Company.

*Death Benefits*

The Plan provides a lump sum payment of $2,500 to your beneficiary on your death after your normal, early or disability retirement. Conditions covering refund of voluntary contributions or required contributions made under a prior plan depend upon the elections made by the employee and are covered in detail in the text of the Plan.

*Refund of Members' Contributions on Termination*

If you terminate your employment before you become vested, you will receive a refund of your contributions, if any, plus interest.

If your termination occurs after you are vested, and you were required to make contributions to a prior Company plan, you may elect to withdraw such contributions, plus interest, at any time before age 65, but if you do so, you will forfeit your right to any benefits based on service for the period in which you made contributions.

*Cost of the Plan*

The cost of providing the Plan benefits is borne entirely by the Company.

*General*

The Plan will be administered by a Committee appointed by the Company.

The contributions made by the Company, as well as yours, if any, will be paid to a Trustee in accordance with the terms of the Plan.

All costs and expenses of the Plan will be paid by the Company.

You may not assign all or any part of your benefits under the Plan.

Benefits provided in this section are forfeited in the event of termination of employment for cause.

While the Company hopes and expects to continue the Plan indefinitely, it reserves the right to amend, modify or terminate the Plan at any time. No amendment, modification of termination shall deprive any member of his benefits accrued to the date of such action, to the extent then funded.

The contents of this section are intended to summarize the major provisions of the Plan. In the event of any inconsistencies between this summarization and the official text of the Plan, the Plan text will govern.

*Pension Calculation Example*

ASSUMPTIONS:

Retirement at age 65
Credited Service of 30 years
Final Average Compensation—$10,000 per year
Primary Social Security Benefit—$2,600 per year

CALCULATION:

| | | |
|---|---|---|
| 1½% of $10,000 | $150 | |
| Multiplied by Credited Service | x30 = | $4500 |
| MINUS | | |
| 1½% of $2600 | $39 | |
| Multiplied by Credited Service | X 30 = | -$1170 |
| Annual Pension Payable | | $3330 |
| Monthly Pension | | $ 279 |

---

## APPENDIX E

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

July 17, 1980

Dixon L. Pyles, Esquire
Pyles & Tucker
507 E. Pearl Street
Jackson, Mississippi 39201

Re: David F. Green v. Amerada Hess Corporation, A-1109

Dear Mr. Pyles:

Your application for a further extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Powell who, on July 17, 1980, signed an order extending your time to and including August 4, 1980.

A copy of the Justice's order is enclosed.

Very truly Yours,

MICHAEL RODAK, JR., Clerk

/s/ FRANCIS J. LORSON
FRANCIS J. LORSON
DEPUTY CLERK

vm
Enc.

cc: Brunini, Grantham, Grower & Hewes

Robert G. Sachse, Esq.

Clerk, U.S. Court of Appeals
for the Fifth Circuit
(79-2927)

SUPREME COURT OF THE UNITED STATES

No. A-1109

DAVID R. GREEN,

Petitioner,

versus

AMERADA HESS CORPORATION

---

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

Upon Consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including August 4, 1980.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 17th
day of July, 1980.

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

---

No. 80-159

---

DAVID R. GREEN,

Petitioner,

versus

AMERADA HESS CORPORATION,

Respondent.

---

On Petition For Writ of Certiorari To
The United States Court of Appeals For
The Fifth Circuit

---

# BRIEF IN OPPOSITION FOR AMERADA HESS CORPORATION

---

Edmund L. Brunini, Jr.
John E. Milner
Brunini, Grantham, Grower
& Hewes
Post Office Drawer 119
Jackson, Mississippi 39205

Robert G. Sachse
Amerada Hess Corporation
Post Office Box 2040
Tulsa, Oklahoma 74102

Attorneys for Respondent

## INDEX


| | Page |
|---|---|
| Table of Cases ..... | i |
| Opinions Below ..... | 1 |
| Jurisdiction ..... | 2 |
| Questions Presented ..... | 2 |
| Constitutional Provisions Involved ..... | 3 |
| Statement of the Case ..... | 3 |
| Reasons for Denying the Writ ..... | 7 |
| I. The Decision of the District Court and the Affirming Decision of the Court of Appeals Were Based Solely on an Issue of State Law in the Absence of Controlling State Precedent, Which Issue Was Not Presented as a Question in the Petition | 7 |
| II. The Questions Presented by Greens' Petition Were Not Considered by the Courts Below and Are Improperly Raised for the First Time in the Petition..... | 11 |
| A. Green has no written, fixed-term contract with Amerada Hess ... | 12 |

B. Green has no property interest and continued employment with Amerada Hess..... 15

C. Green has no Fifth Amendment due process protection regarding his discharge by Amerada Hess ..... 16

D. This Court recognizes the validity of the terminable at will employment relationship and will not arbitrarily eliminate this important employment status ..... 17

III. The Single State Law Issue Properly Presented to this Court Presents No Conflict of Decisions or Important Questions of Federal Law .... 19

Conclusion ..... 22

Certificate of Service ..... 23

## TABLE OF CASES


Page

Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).. 18

Appalachian Power Co. v. American Institute of Certified Public Accountants, 4 L.Ed. 2d 30 (1959) (opinion in chambers) ..... 7

Bishop v. Wood, 426 U.S. 341 (1976).. 6, 7, 8, 14

Crownover v. Sears, Roebuck & Co., 594 F.2d 565 (6th Cir. 1979) ..... 20

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) ..... 12

Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1948), affirmed 339 U.S. 605 (1949) ..... 13

Helvering v. Minnesota Tea Co., 296 U.S. 378 (1935) ..... 11

Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979) ..... 20

Lawn v. U. S., 355 U.S. 339 (1967)... 10

Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977) ..... 19

Moore v. Home Insurance Co., 601 F.2d 1072 (9th Cir. 1979) ..... 20

National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206 (1939) ..... 17

New Haven Inclusion Cases, 399 U.S. 392 (1970) ..... 14

Palmer v. Hoffman, 318 U.S. 109, rehearing denied 318 U.S. 800 1943) ..... 8

Public Utilities Commission v. Pollak, 343 U.S. 451 (1951) ..... 16

Ramsey v. United Mine Workers, 401 U.S. 302 (1971) ..... 11

Ruhlin v. New York Life Insurance Co., 304 U.S. 202 (1937) ..... 20

Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910 (E.D. Mich. 1978). 14, 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

---

No. 80-159

---

DAVID R. GREEN,

Petitioner,

versus

AMERADA HESS CORPORATION,

Respondent.

---

On Petition For Writ of Certiorari To
The United States Court of Appeals For
The Fifth Circuit

---

# BRIEF IN OPPOSITION FOR AMERADA HESS CORPORATION

---

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, affirming the unreported Opinion of the

District Court, reported at 612 F.2d 212 (1980), rehearing and rehearing en banc denied, 614 F.2d 1298 (1980).

## JURISDICTION

The Petition for Certiorari (hereinafter referred to as the "Petition") has adequately set forth the jurisdiction of this Court.

## QUESTIONS PRESENTED

The sole question which could be properly presented to this Court, but which has not been presented by Petitioner, is whether Petitioner has a civil cause of action for wrongful discharge under Mississippi law on the ground that he was discharged for pursuing his rights under Mississippi's workmen's compensation statutes. The four questions presented by Petitioner are improperly raised for the first time in the Petition.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case does not properly involve the Fifth Amendment to the United States Constitution or any other federal constitutional provisions, treaties, statutes, ordinances or regulations.

## STATEMENT OF THE CASE

Petitioner (hereinafter referred to as "Green") was first employed by Respondent (hereinafter referred to as "Amerada Hess") on January 1, 1972. (R. 61, 186) He did not have a written contract of employment during the entire time that he worked for Amerada Hess, but was hired for an indefinite period of time. (R. 142a, 186) On April 15, 1973, while in the employ of Amerada Hess, Green sustained an injury as a result of an employment-related accident. (R. 1, 200) Green filed an accident report the next day, but continued working until April 9, 1974, at which time he entered the hospital for diagnostic tests.

(R. 92, 191) After a one-week hiatus, Green returned to work until October, 1974, when he was hospitalized for back surgery. (R. 2, 191) After recuperating, he resumed his employment in December, 1974. (R. 191) On July 24, 1975, Green's employment with Amerada Hess was terminated for cause[1]. (R. 186, 192).

On June 12, 1978, Green filed a complaint in the United States District Court for the Southern District of Mississippi, Eastern Division (hereinafter referred to as the "District Court"), alleging that Amerada Hess wrongfully discharged him for pursuing his rights under Mississippi's workmen's compensation act, MISS. CODE ANN. §§ 71-3-1

---

[1]Although Green's allegations were taken as true by the District Court for the sole purpose of considering whether Green had a wrongful discharge cause of action under Amerada Hess' Motion for Summary Judgment, Amerada Hess has consistently maintained that Green was terminated for cause.

et seq. (1972) (R. 1-3, 207). Jurisdiction was based solely on diversity of citizenship under 28 U.S.C. § 1332. (R. 209, Pet. App. A, at 9a)

On June 21, 1978, the District Court granted Amerada Hess's Motion for Summary Judgment on the sole ground that Green's claim did not state a valid cause of action under Mississippi law. The elements of the District Court's decision, rendered in the absence of controlling Mississippi precedent, were: (1) Green was employed for an indefinite term and, therefore, his employment was terminable at the will of either party under Mississippi law; (2) the Mississippi workmen's compensation act provided no wrongful discharge cause of action; and (3) therefore, Green had no such wrongful discharge cause of action under Mississippi law. (R. 209-211, Pet. App. B at 8a-9a).

Green appealed the District Court's ruling to the United States Court of Appeals for the Fifth Circuit (hereinafter referred to as the "Court of Appeals") on August 2, 1979 (R. 212) on the "sole question" of whether Green "had a cause of action for being discharged in retaliation for filing a workmen's compensation claim." Appellant's Brief, at 1) The case was placed on summary calendar and on February 21, 1980, the Court of Appeals affirmed the District Court's ruling on the sole state law ground considered by the District Court. The Court of Appeals agreed that since Green's employment was terminable at will under Mississippi law, and since the Mississippi workmen's compensation act provided no wrongful discharge cause of action, then Green had no such wrongful discharge cause of action under Mississippi law. 612 F.2d at 214 (Pet. App. A at 2a-4a). Green's petition for rehearing and

rehearing en banc was denied by the Court of Appeals on March 18, 1980.

## REASONS FOR DENYING THE WRIT

### I.

### The Decision Of The District Court And The Affirming Decision Of The Court Of Appeals Were Based Solely On An Issue Of State Law In The Absence Of Controlling State Precedent, Which Issue Was Not Presented As A Question In The Petition.

This diversity case involves exclusively a determination of Mississippi law by the District Court, which was upheld on the same state law ground by the Court of Appeals. This Court accepts a determination of state law as found by a court of appeals in a diversity action, particularly when the same finding is made by the federal district court. Appalachian Power Co. v. American Institute of Certified Public Accountants, 4 L.Ed.2d 30, 32 (1959) (opinion in chambers), and will not set aside the decisions of lower courts applying state law

"except on a plain showing of error." Palmer v. Hoffman, 318 U.S. 109, 118, rehearing denied 318 U.S. 800 (1943).

This court applied these standards in a recent case dealing with the rights of a terminable at will city employee under a city employment discharge ordinance, Bishop v. Wood, 426 U.S. 341 (1976). This Court stated:

> We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge, who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner 'held his position at the will and pleasure of the city' [since the employment contract was "'terminable at the will of either party.'"] This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit, albeit by an equally divided court. In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have

> concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.
>
> The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court...; and it was accepted by the Court of Appeals for the Fourth Circuit. These reasons are sufficient to foreclose our independent examination of the state-law issue.

Id. at 346, n.9, 347 (emphasis added).

The instant case and Bishop are similar in several important respects: (1) The district court judge in each case was required to interpret state law in the absence of controlling state law precedent; (2) each court of appeals placed special weight on the district court judge's familiarity with state law; and (3) as in Bishop, the decision of the District Court below on the state law issue is tenable; is based on state case and statutory law; and was accepted by the Court of Appeals. Thus, this Court should accept the decisions of

the District Court and the Court of Appeals and deny the Writ of Certiorari (hereinafter referred to as the "Writ").

Furthermore, Green did not present as a question for review in the Petition this single state law question presented to and considered by the District Court and the Court of Appeals - whether Green has, under Mississippi law, a cause of action for wrongful discharge for pursuing workmen's compensation rights. Rule 23 of the revised rules of this Court provides that "[o]nly the question set forth in the petition or fairly comprised therein will be considered by the court." Since Green did not present this issue as a question for review in his Petition, then it is not properly before this Court. E.g. Lawn v. U. S., 355 U.S. 339, 362, n.16 (1957). Therefore, the Petition presents no legitimate questions for consideration and the Writ should be denied.

## II.

## The Questions Presented By Green's Petition Were Not Considered By The Courts Below And Are Improperly Raised For The First Time In The Petition.

Instead of presenting in his Petition the sole state law question that could properly come before this Court, Green has raised four questions which were not presented to or considered by the courts below and for which there is no support in the record. This Court does not ordinarily consider questions raised for the first time in the petition for certiorari. Helvering v. Minnesota Tea Co., 296 U.S. 378, 380 (1935). This position was recently well-stated in Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971):

> We find no reference to this aspect of the case in the opinions of the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance.

Therefore, no questions are properly presented to this Court for consideration, requiring the denial of the Writ.[2]

For the sole purpose of further showing to this Court that the Writ should be denied, we will briefly address Green's arguments under each of the four questions improperly presented to this Court.

A. Green has no written, fixed-term contract with Amerada Hess.

Green contends that he has a "written fixed term contract" based on the existence of the Amerada Hess personnel handbook

---

[2]Even where an issue is "belatedly raised on oral argument in the Court of Appeals and given "cursory treatment", this Court has held that such an issue is not properly before it on petition for certiorari. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 108, n.21 (1979). Green did not argue to the District Court that he had a "written fixed term contract" with Amerada Hess and there was no oral argument before the Court of Appeals. Furthermore, Green did not present the question in his appellate briefs to the Court of Appeals.

(which discusses the company pension plan, savings and stock bonus plan, medical, and income protection and life insurance plans and additional employee benefits), entitled "Benefit Program for Employees", and based on an alleged agreement to invest 4% of his monthly income in Amerada Hess. This latter "agreement" is apparently participation by Green in the savings and stock bonus plan.

This argument is in direct conflict with the concurrent finding of fact by the District Court and the Court of Appeals, which Green did not contest, that Green had no written employment contract but was hired for an indefinite period of time. This Court will not review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. E.g. Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1948), affirmed 339 U.S. 605 (1949). There was

no such error below since the record supports the finding by affidavit (R. 186) and by the admission of Green himself in his deposition that he had no written contract of employment with Amerada Hess. (R. 142a) Furthermore, the bases for the implication for a fixed term contract, the personnel handbook and the alleged investment agreement, are not even part of the record. This Court has held that it will not consider documents that are not record evidence in the courts below. E.g. New Haven Inclusion Cases, 399 U.S. 392, 450, n.66 (1970). Therefore, this Court should not review this concurrent finding of fact.

As to the substance of Green's argument, the personnel handbook merely informed employees about company benefit plans and contained no language which could be construed as an employment contract for a fixed term. See Schroeder v. Dayton-Hudson Corp., 448 F.Supp. 910, 916-917

(E.D. Mich. 1978) (personnal handbook held not to be a fixed term contract, but merely informed employees about company benefits and policies). Green's participation in the savings and stock bonus plan was not "independent consideration" evidencing a contract for a definite term, which is a state law question not raised or considered by the courts below and therefore not before this Court. This plan is essentially a voluntary payroll savings and investment plan. Green's contributions to the plan could be completely withdrawn at any time and, shortly after Green's termination, the total value of his contributions were paid to him as required by the plan.

B. Green has no property interest in continued employment with Amerada Hess.

Green argues that he has a property interest in continued employment with Amerada Hess. This contention has no

merit since a terminable at will employee, such as Green, has no property interest in his job under Mississippi law. This conclusion is supported by Bishop v. Wood, supra, in which this Court stated that "a holding that as a matter of state law the employee 'held his position at the will and pleasure of the city' necessarily established that he had no property interest." 426 U.S. at 345, n.8.

C. Green has no Fifth Amendment due process protection regarding his discharge by Amerada Hess.

Even if Green had a property interest in his job with Amerada Hess, he was not entitled to any Fifth Amendment due process protection with respect to his discharge. Amerada Hess is a private employer and the Fifth Amendment places restrictions only on the federal government, not private parties. E.g., Public Utilities Commission v. Pollak, 343 U.S. 451, 461-62 (1951).

Only federal government employees can claim Fifth Amendment due process protection with respect to employment discharges. Green has no rights under the Fifth Amendment due process clause.

D. This Court recognizes the validity of the terminable at will employment relationship and will not arbitrarily eliminate this important employment status.

Green argues that if his employment is terminable at will under Mississippi law, then this Court should eliminate the terminable at will relationship in private employment by implying a requirement that such employees be discharged only for cause. Thus, Green has requested this Court to create a wrongful discharge cause of action for employees hired for an indefinite time and without a written contract.

This Court has acknowledged that the terminable at will employment relationship is "a recognized principle of law." National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206, 219 (1939). This

Court further recognized in a recent case, Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 324 (1972), that "the very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will." Thus this Court has made it clear that it will not create a wrongful discharge cause of action where the discharged employee is terminable at will as Green is.

Additionally, the terminable at will employment relationship provides indefinite term employees an equal right to terminate their employment at any time and without any justification or notice to their employers. The terminable at will rule, therefore, is fair and equitable for both employers and employees and should not be eliminated or modified.

## III.

## The Single State Law Issue Properly Presented To This Court Presents No Conflict Of Decisions Or Important Questions Of Federal Law.

The decision of the Court of Appeals is not in conflict, directly or otherwise, with the decisions of this Court or of another Court of Appeals, or with Mississippi law on the only issue that could properly be brought before this Court - whether Green, a terminable at will employee, has a wrongful discharge cause of action under Mississippi law for being discharged for pursuing workmen's compensation rights. This Court has not addressed this issue nor has the Mississippi Supreme Court. The only other court of appeals decision (and also the only other federal court decision) on this specific issue, Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977), decided this issue in complete harmony with and employed the same analysis as the

ruling of the Court of Appeals below.[3] Even if there were conflicting decisions among the circuits on this issue, this conflict would not be a reason for granting Green's Petition. "As to questions controlled by state law...conflict among circuits is not of itself a reason for granting a writ of certiorari" since the "conflict may be merely corollary to a permissible difference of opinion in the state courts." Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 206 (1937). Furthermore, as Ruhlin points out, conflict among the state courts on the wrongful discharge

---

[3]The other Court of Appeals decisions dealing with the general issue of whether a terminable at will employee has a cause of action for wrongful discharge have upheld the denial of such causes of action on summary judgment. See Moore v. Home Insurance Co., 601 F.2d 1072, 1074-75 (9th Cir. 1979) (wrongful discharge cause of action denied to terminable at will employees; summary judgment for employer affirmed); Crownover v. Sears Roebuck & Co., 594 F.2d 565, 566 (6th Cir. 1979) (same holding); Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979) (same holding).

issue is no basis for granting the Writ in this case.

The Court of Appeals has not decided an important question of federal law which would justify the granting of a Writ of Certiorari. Instead, the sole issue presented to and considered by the Court of Appeals, as well as the District Court, concerned an interpretation of Mississippi law. As stated above, this Court does not grant a Writ of Certiorari to review a state law issue interpreted harmoniously by a district court and a court of appeals. This rule is particularly applicable to this case where the state law rights of a single private individual are being litigated and where the state law being attacked, the terminable at will rule, is based on the traditional common law.

Additionally, the federal question submitted by Green - whether he was deprived of a property interest in violation of the Fifth Amendment due process clause - was

improperly raised for the first time in Green's Petition. In any event, the question has no merit since the Fifth Amendment affords no protection to private parties such as Green. Therefore, the Writ should be denied.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDMUND L. BRUNINI, JR.
JOHN E. MILNER
ROBERT G. SACHSE

E. L. Brunini, Jr.

Edmund L. Brunini, Jr.
Counsel for Respondent,
Amerada Hess Corporation

OF COUNSEL:
EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
Post Office Drawer 119
Jackson, Mississippi 39205

ROBERT G. SACHSE
AMERADA HESS CORPORATION
Post Office Box 2040
Tulsa, Oklahoma 74102

## CERTIFICATE OF SERVICE

I, EDMUND L. BRUNINI, JR., one of the attorneys for Respondent, Amerada Hess Corporation, hereby certify that I have this day mailed the requisite number of true copies of Amerada Hess Corporations's foregoing Brief to counsel for David R. Green, separately represented at their usual post office addresses, by first class U. S. Mail, postage prepaid, as follows: Dixon L. Pyles, Esq., Pyles & Tucker, 507 East Pearl Street, Jackson, Mississippi 39201; and James M. Brown, Esq., Butler & Brown, Post Office Box 393, Laurel, Mississippi 39940.

DATED: September 24, 1980.

E. L. Brunini, Jr.

EDMUND L. BRUNINI, JR.